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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FAIR HOUSING COUNCIL OF OREGON,

an Oregon nonprofit corporation,

3:15-cv-00925-SB

Plaintiff,

v.

**PLAINTIFF'S RESPONSE TO
DEFENDANT
PROGRESSIVE'S MOTION
FOR SUMMARY JUDGMENT**

**TRAVELERS CASUALTY AND SURETY
COMPANY**, a foreign insurer; **TRAVELERS
CASUALTY AND SURETY COMPANY OF
AMERICA**, a foreign insurer; **TRAVELERS
CASUALTY INSURANCE COMPANY OF
AMERICA**, a foreign insurer; **TRAVELERS
HOME AND MARINE INSURANCE
COMPANY**, a foreign insurer; **TRAVELERS
PROPERTY CASUALTY COMPANY OF
AMERICA**, a foreign insurer; **TRAVELERS
PROPERTY CASUALTY INSURANCE
COMPANY**, a foreign insurer; **TRAVELERS
INDEMNITY COMPANY**, a foreign insurer;
**TRAVELERS INDEMNITY COMPANY OF
AMERICA**, a foreign insurer; **TRAVELERS
CASUALTY COMPANY**, a foreign insurer;
**PROGRESSIVE INSURANCE
CORPORATION, INC.**, an Oregon
corporation, dba **LLOYD PURDY & CO.**, an
Oregon assumed business name,

Defendants

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Defendant Progressive Insurance Corporation, Inc. (“Defendant Progressive”) moves for summary judgment on all claims brought against it by Plaintiff Fair Housing Council of Oregon (“FHCO”). Although arranged in somewhat of a different order, other than the new argument discussed below, Defendant Progressive’s arguments are identical to those raised in its response to FHCO’s Motion for Summary Judgment. As a result, FHCO incorporates by reference its Reply to Defendant Progressive’s Response to Plaintiff’s Motion for Summary Judgment. Defendant Progressive also incorporates by reference Defendants Travelers Home and Marine Insurance Company and Travelers Indemnity Company of America’s (the “Travelers Defendants”) Motion for Summary Judgment. FHCO incorporates by reference its Response to the Travelers Defendants’ Motion for Summary Judgment.

The only new argument raised by Defendant Progressive in its motion is that it should not be held liable in its capacity as an agent for the Travelers Defendants because, when Defendant Progressive’s agent, Ann Walsh, was told by an underwriter that the Travelers Defendants would not make an exception to its breed restriction policy for a pit bull assistance animal, Ms. Walsh was left with only three choices: (1) she could have “stonewalled” the tester and not responded to his request, (2) she could have lied to the tester and told him that the Travelers Defendants would issue him a policy, or (3) she could tell the tester that the Travelers Defendants would not make an exception. Defendant Progressive’s Motion for Summary Judgment, ECF No. 86, at 8-9. According to Defendant Progressive, it essentially had no choice but to enforce the Travelers Defendants’ policy. This argument is without merit.

This situation is directly addressed by the law review article on which Defendant Progressive heavily relies. After noting that the Fair Housing Act provides protections for agents such as those in Defendant Progressive’s position, the article states, “the proper course for an agent or realtor instructed to discriminate is not to pass on discriminatory statements to a

minority prospect, but to ignore the illegal instructions or resign the position.” Robert G. Schwemm, *Discretionary Housing Statements and Section 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 298 (2001); *see also* *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979), citing Restatement (Second) of Agency § 411 (1958) (“An agent has no obligation to carry out his principal’s order to do an illegal act.”).

In this situation, Defendant Progressive also had other options. Ms. Walsh could have told either the Travelers Defendants or the tester that she did not agree with the Travelers Defendants’ decision and put them in direct contact with one another to address the situation. Alternatively, given that Defendant Progressive is an agent for a number of insurance providers, Ms. Walsh could have attempted to obtain insurance for the tester from another company. Defendant Progressive argues that such an effort would be futile because all of the companies that Defendant Progressive represented have breed restriction policies, but Defendant Progressive does not know whether those other companies would have complied with their legal obligation to waive the policy for an assistance animal. Defendant Progressive did not make an effort to find out and chose not to do anything but blindly enforce the Travelers Defendants’ unlawful policy. As a result, Defendant Progressive is jointly and severally liable for the violation.

Defendant Progressive cannot meet its burden of proving as a matter of law that it should not be held liable for enforcing the Travelers Defendants’ unlawful policy. To the contrary, the

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law is well-settled that Defendant Progressive is liable in this situation. As a result, Defendant Progressive's Motion for Summary Judgment should be denied.

DATED this 20th day of July, 2016.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

s/Dennis Steinman

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